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No. 88-1659

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THEODORE KANNE and
BEATRIZ KANNE,

Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 1, 1989

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Questions Presented

1. Should this Court review the question whether the exclusive federal civil enforcement remedies established by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, preempt a private right of action for improper processing of claims that was implied under a provision of California law that the California Supreme Court has now decided was never intended to create a private civil cause of action?

2. Should this Court review the question whether the medical benefits plan in this case is an employee benefit plan governed by ERISA despite determinations on the available record by both the district court and the court of appeals that it is such a plan and despite the failure by petitioners to dispute the existence of an ERISA plan until their petition for rehearing in the court of appeals?*

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* The parent company of respondent Connecticut General Life Insurance Company is Connecticut General Corporation. The parent of Connecticut General Corporation is CIGNA Holdings, Inc., the parent of which is CIGNA Corporation. Connecticut General's affiliates and subsidiaries (other than wholly owned subsidiaries) are Apollo Computers, Inc., Greenspoint Marriott Restaurant Corporation, Lotus Development Corp., Maritime Beverages Limited, North Coast Investment Corporatin, PCGP, Inc., Reflectone, Inc., River Oaks Industries, Inc., Sterling Chemicals, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Connecticut General Life Insurance Company, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. That decision, as amended, is reported at 867 F.2d 489 (1989).

STATEMENT OF THE CASE

Respondent does not deem it necessary to set forth detailed corrections to the petitioners' statement of the case. Rather, for purposes of this brief in opposition, respondent simply relies on the court of

appeals' statement of the case, *see* 867 F.2d, at 491, and the following brief statement.

In 1982, the Kannes initiated a suit against Connecticut General in the California Superior Court for improper processing of claims relating to the treatment of their son. The Kannes' complaint sought compensatory and punitive damages on the basis of several common law causes of action as well as an implied private right of action under Cal. Ins. Code § 790.03 (Deering Supp. 1989) ("Section 790.03"). No recovery was sought under the applicable provisions of the Employee Retirement Income Security Act ("ERISA").

The case was removed to federal court on the basis of diversity of citizenship. Connecticut General asserted ERISA defenses in its answer, and throughout the district court proceedings took the position that ERISA preempted all of the Kannes' state law claims. After a non-jury trial, the district court found that "the plan under scrutiny is an ERISA plan." 607 F. Supp. 899, 904 (C.D. Cal. 1985). However, the court held that the Kannes' claims were not preempted by ERISA because the Kannes' common law and statutory claims were saved from preemption by 29 U.S.C. § 1144(b)(2)(A) as laws that regulate insurance. The court awarded the Kannes $250,000 for emotional distress and embarrassment and $500,000 in punitive damages for breach of an implied covenant of good faith and fair dealing and violation of the California Insurance Code.

Connecticut General appealed to the Ninth Circuit. The case was argued and submitted, but withdrawn pending this Court's decision in *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987). After *Pilot Life*

was decided, the court of appeals reviewed *de novo* the district court's conclusion that the Kannes' claims were not preempted by ERISA. It held that "[b]ecause the claim 'relate[s] to an employee benefit plan," all of the Kannes' state law claims were preempted. 819 F.2d 204 (9th Cir. 1987) (*quoting Metropolitan Life Insurance Co.* v. *Taylor*, 107 S. Ct. 1542, 1546 (1987)). The district court's decision was accordingly reversed.

The Kannes petitioned for rehearing, arguing that the court of appeals erred in holding that *Pilot Life* required preemption of their statutory as well as common law claims, and raising for the first time the contention that the insurance policy in question was not the funding mechanism for a plan governed by ERISA. The court granted the Kannes' petition, and permitted the Kannes to brief the questions (1) whether ERISA governed the relevant plan and (2) whether ERISA preempted the cause of action implied under Section 790.03. 823 F.2d 284 (9th Cir. 1987). The court answered both questions affirmatively. *See* 859 F.2d 96 (9th Cir. 1988), *as amended* 867 F.2d 489 (9th Cir. 1989).

REASONS WHY THE PETITION SHOULD BE DENIED

I

The First Question Does Not Present an Issue of General Importance Nor Is It a Source of Conflict Among the Circuits

The first question presented in the Petition is whether ERISA preempts the private cause of action previously available under Section 790.03. Following this Court's decision in *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), the Ninth Circuit held both initially and on rehearing that the petitioners'

implied cause of action under Section 790.03 was preempted by ERISA. Petitioners claim that this question "is of tremendous importance" and that "it is urgent that this Court resolve this issue." Pet. at 22. Apart from noting the obvious correctness of the Ninth Circuit's resolution of this question under *Pilot Life*, discussed in Part III hereof, it is respectfully submitted that there is no conflict among the Circuits on this issue and, even if this question was ever of any importance, it is no longer of any importance because the California Supreme Court has now held that Section 790.03 was never intended to create a private right of action.

In *Royal Globe Insurance Co.* v. *Superior Court*, 23 Cal. 3d 880, 592 P.2d 329 (1979), a closely divided California Supreme Court held that a private right of action for damages for unfair claims practices could be implied from Section 790.03. Thus, one of the bases for recovery asserted by the Kannes in their original complaint was that Connecticut General had failed to comply with Section 790.03. After the Ninth Circuit found this action to be preempted by ERISA but before it reaffirmed its conclusion on rehearing, the California Supreme Court overruled *Royal Globe*, holding squarely that Section 790.03 was not "intended to create a private civil cause of action against an insurer" for unfair claims practices. *See Moradi-Shalal* v. *Fireman's Fund Insurance Co.*, 46 Cal. 3d 287, 304, 758 P.2d 58, 68 (1988). Although the California Supreme Court held that its decision would be applied prospectively "in the interest of fairness to the substantial number of plaintiffs who have already initiated their suits in reliance on *Royal Globe*," *id.*, at 305, 758 P.2d, at 69, the question petitioners seek

to have reviewed by this Court will have no significance for any case initiated after the *Moradi-Shalal* decision.

Petitioners seek to minimize the significance of this development by stating that because the *Moradi-Shalal* decision applies prospectively, it "does not affect the large number of pending cases asserting causes of action under California Insurance Code Section 790.03(h)." Pet. at 26. Even if true, this assertion does little to enhance the importance of the question petitioners present in their Petition. Petitioners never explain why a question that affects only a limited number of cases and that will not arise in the future is of sufficient importance to warrant review by this Court. The Ninth Circuit's decision does not conflict with the decision of another federal court of appeals or with the decision of the state court of last resort, in this case the California Supreme Court. On the contrary, the California Supreme Court, like the Ninth Circuit, has concluded that ERISA preempts Section 790.03 causes of action. *See Commercial Life Insurance Co.* v. *Superior Court*, 47 Cal. 3d 473, 764 P.2d 1059 (1988), *cert. denied sub nom. Juliano* v. *Commercial Life Insurance Co.*, 57 U.S.L.W. 3753 (U.S. May 15, 1989).[1] Thus, the highest federal and state courts that have considered the question—the judicial bodies most familiar with Section 790.03 and with the cases pending that present this question—have

[1] The question presented in the *Juliano* petition was virtually identical to the first question presented by petitioners in this case. That the Court so recently denied review in *Juliano* confirms that the first question presented does not warrant review by this Court.

reached the same conclusion as to the effect of ERISA on Section 790.03.[2]

Perhaps recognizing the relatively narrow significance of the first question presented, petitioners state that "[n]umerous other states have laws which seek to deter unfair insurance practices by assessing various penalties." Pet. at 26. This observation is significant, according to petitioners, because such statutes "will be rendered a nullity under the *Kanne* Court's interpretation of this Court's decision in *Pilot Life*." Pet. at 28. This suggestion is simply incorrect. The Ninth Circuit held only that ERISA preempts Section 790.03 causes of action. Although the court's reasoning may apply with equal persuasive force to other states' laws, the decision in *Kanne* will not *ipso facto* control the disposition in such cases. In any given case, the preemption inquiry must inevitably involve consideration of the unique characteristics of the state law in question. *See Pilot Life*, 481 U.S., at 50-51 (relevant consideration is whether the means of enforcing the law in question conflicts with ERISA's exclusive federal remedies for plan participants, an inquiry requiring examination of the intent and impact of the law in question).

Since private causes of action like the one held to be preempted in this case are no longer available

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[2] Other courts of appeals have found preemption of private causes of action under state laws similar to Section 790.03. *See In re Life Insurance Company of North America*, 857 F.2d 1190 (8th Cir. 1988) (ERISA preempts private cause of action for vexatious refusal to pay insurance benefits under Mo. Rev. Stat. § 375.420); *Anschultz* v. *Connecticut General Life Insurance Co.*, 850 F.2d 1467 (11th Cir. 1988) (ERISA preempts private cause of action under Fla. Stat. § 624.155).

under Section 790.03, this case is an obviously inappropriate vehicle for this Court's examination of the validity of other state statutory causes of action even if the Court were inclined to undertake such an abstract inquiry. The Court should not do so. Deciding whether ERISA preempts causes of action under other states' statutes should await cases actually involving those statutes.

II

Petitioners Did Not Properly Raise or Preserve the Second Question Presented

The second question presented in the Petition is whether the medical benefits plan in this case is an employee benefit plan governed by ERISA. The petitioners assert that several courts of appeals have adopted varying criteria for determining the existence of an ERISA plan, and that it is important for this Court to review the Ninth Circuit's determination. *See* Pet. at 41. However, this case presents an especially inappropriate vehicle for providing meaningful review of this highly fact-specific question. Therefore, even assuming that the petitioners are correct in predicting that there will be other Petitions seeking review of this issue filed in this Court, there is no reason to review it in this case.

From the time it answered the complaint, and throughout the proceedings, Connecticut General took the position that the Kannes' claim was for the enforcement of rights under an ERISA plan and that their exclusively state law claims were preempted by ERISA. As the petitioners themselves acknowledge, they did not dispute that the plan in question was an ERISA plan until after the district court had found,

after trial, that the plan under scrutiny was an ERISA plan and the court of appeals had ruled that ERISA preempted their claims. Petitioners did not contest the existence of an ERISA plan until they filed their petition for rehearing in the court of appeals. The court of appeals granted the petition and ruled, as had the trial court, that the plan was indeed governed by ERISA.[3] Having failed to dispute the existence of an ERISA plan at trial or even initially in the court of appeals, petitioners are in no position to ask this Court to review the Ninth Circuit's decision on the ground that the decision "is not supported by any evidence." Pet. at 20; *see id.*, at 49-50. Presumably, petitioners would have this Court vacate the Ninth Circuit's decision and remand the case for a re-determination of this issue by the trial court after receiving whatever additional unspecified evidence petitioners would, in the eleventh hour of this litigation, decide to place in the record. Such is not the function of this Court's discretionary jurisdiction.

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[3] Because both the district court and the court of appeals found the plan in question to be an ERISA plan, application of the "two court rule" precludes review by this Court "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Petitioners have made no such showing.

It is no objection that the determination in question may be characterized as a "mixed" question of law and fact, because the "two court rule" has been applied to analogous determinations. *See, e.g., United States* v. *Doe*, 465 U.S. 605, 613-614 (1984) ("two court rule" applied to finding that act of producing certain documents would constitute testimonial self-incrimination); *Graver Tank Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949) ("two court rule" applied to determination that welding process constituted patentable invention).

Petitioners argue that the Ninth Circuit's "opinion acknowledges that at the trial 'the parties did not contest the issue of whether the ABC Trust was an ERISA plan.' " Pet. at 19-20 (emphasis in original) (*quoting Kanne*, 867 F.2d, at 492). From this, petitioners infer that therefore "*this issue was never litigated.*" Pet. at 20. But the fact is that the issue was litigated, but *not contested.* To the extent that petitioners failed to preserve the ERISA plan question properly below, this case is simply unsuited for review by this Court.

In this case, the issue was presented below, but not contested by petitioners until it was obvious to them that their other legal arguments were foreclosed by a decision of this Court. Therefore, petitioners' failure to dispute the existence of an ERISA plan in the district court led to the purported lack of evidence which, they now say, undermines the Ninth Circuit's decision rejecting their claim. Thus, even if the record below contains less evidence on this question than the petitioners would prefer,[4] the state of the record is directly attributable to presumably intentional tactical decisions by petitioners, decisions which preclude intervention at this stage by this Court. In effect, petitioners are seeking a writ of certiorari not to have this Court decide an important question of law, but to have the Court remand a question to the district court—the court in which petitioners should have litigated this question in the first instance. Simply put, the second question presented is not of the kind con-

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[4] In fact, Connecticut General introduced ample evidence to support its position that the plan in question was an ERISA plan and that the petitioners' claims were therefore preempted. *See, infra*, Part III, A.

templated for review by Rule 17 of the Rules of this Court.

III

The Ninth Circuit Correctly Concluded That ERISA Preempts the Petitioners' Claims

The Ninth Circuit concluded both that the plan in question was governed by ERISA and that ERISA preempts petitioners' claims for improper processing under Section 790.03. In addition to the reasons already discussed, a third reason for denying the Petition is that the Ninth Circuit decided these questions correctly.

A. The Record Presented Supports the Rulings Below With Respect to the Existence of an ERISA Plan

Theodore Kanne was employed by Harlow Carpets, a member of an employer group called The Associated Builders and Contractors ("ABC"). 867 F.2d, at 491, Pet. app. at D-85. ABC administered a group health insurance plan to which Harlow Carpets subscribed. *Id.* As required by ERISA, ABC established the plan as a trust entity called the ABC Trust. *Id.* The trust purchased a group health insurance policy from Connecticut General. *Id.* The plan brochure described the plan as an ERISA plan. *Id.* As an employee of Harlow Carpets, Mr. Kanne was covered by the policy. *Id.* ERISA provides in pertinent part:

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5). Under this provision, the Ninth Circuit concluded that, because it administered the plan on behalf of Harlow Carpets and its other members, "ABC can be an ERISA employer for purposes of our analysis." 867 F.2d, at 493, Pet. app. at D-90.

Petitioners challenge this conclusion on the ground that "there was no evidence that Harlow Carpets (or, for that matter, any other employer) played any part in the management of ABC, the purported 'ERISA employer,' and no evidence that ABC was a group of homogeneous, related employers." Pet. at 49-50. As noted above, petitioners failed to dispute the existence of an ERISA plan at trial or even on appeal except on rehearing, so that it is understandable that Connecticut General had no opportunity to respond with evidence to these tardy objections by petitioners. Nevertheless, based on the evidence in the record before it, the district court specifically concluded that "the plan under scrutiny is an ERISA plan." 607 F. Supp., at 904. When petitioners finally objected to this conclusion in their petition for rehearing and the Ninth Circuit agreed to review the question, that court was certainly entitled to base its decision on, and to draw reasonable inferences from, the record before it.

That record amply supports the conclusion that Harlow Carpets was a member of ABC, that ABC was an employer association of builders and contractors, that ABC established and administered an ERISA medical benefits plan for its member firms, and that Harlow Carpets subscribed to the plan. Given the lack of any contrary evidence, the court of appeals was more than justified in concluding, in the words

of ERISA, that ABC was "a group or association of employers acting for" Harlow Carpets "in relation to an employee benefit plan." 29 U.S.C. § 1002(5).

Having correctly found ABC to be an "employer" within the meaning of ERISA, the court below analyzed whether the plan in question was governed by ERISA. In doing so, that court examined regulations promulgated by the Secretary of Labor defining the phrase "employee welfare benefit plan." Those regulations bring within ERISA's coverage all group insurance programs except those that possess four specified attributes. *See* 29 C.F.R. § 2510.3-1(j)(1987).

The regulation provides in relevant part that an ERISA plan

> shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
>
> (1) No contributions are made by an employer or employee organization;
>
> (2) Participation in the program is completely voluntary for employees or members;
>
> (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; *and*
>
> (4) The employer or employee organization receives no consideration in the form of cash

> or otherwise in connection with the program, other than reasonable compensation, excluding any profit, or administrative services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j) (1987) (emphasis added).

Petitioners argued that the ABC plan fell within all four of these criteria and was therefore excluded from ERISA's coverage. The Ninth Circuit disagreed, noting that the failure to possess of any one of the four criteria "would prevent the exclusion of the insurance plan from ERISA coverage." 867 F.2d, at 492. Although that court found the record less than comprehensive regarding the first, second, and fourth criteria, it found that the plan clearly failed to satisfy the third criterion and therefore was not excluded from ERISA coverage. *See* 867 F.2d, at 492-93.

Petitioners do not seriously dispute the Ninth Circuit's conclusion under the regulation. Rather, they question the validity of the regulation itself. *See* Pet. at 45-47.[5] Petitioners cite two cases they say have

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[5] Petitioners raised no such challenge to the regulation before the Ninth Circuit, thus depriving the Labor Department of any opportunity to defend its approach in the court below. Petitioners not only failed to challenge the regulation below, but actually themselves relied on it in support of their claim. Thus, in their petition for rehearing in the Ninth Circuit, petitioners cited a case which, according to petitioners, "points out that under 29 C.F.R. Section 2510.3-2(i) *ERISA does not apply to insurance arrangements in which the employer is virtually uninvolved, i.e., makes no contributions.*" Brief for Rehearing of Plaintiffs and Appellees at 11-12, *Kanne* v. *Connecticut General Life Insurance Co.*, 819 F.2d 204 (9th Cir. 1987) (No. 85-5641) (emphasis in original). Having relied on the regulation below, petitioners should not now be permitted to challenge it in this Court.

rejected the approach adopted in the Labor Department's regulations. Both of these cases are from the California Court of Appeal. The first, *Rizzi* v. *Blue Cross of Southern California*, 206 Cal. App. 3d 380 (1988), held that an employer's purchase of a group medical insurance policy for its employees and payment of the premiums established an ERISA plan, even though the employer performed no administrative functions with respect to the plan. In addition, the court held that ERISA preempts both common law and Section 790.03 claims relating to unfair claims practices. The court expressly agreed with the Ninth Circuit in *Kanne* that *Pilot Life* requires such preemption. Thus, *Rizzi* actually undercuts rather than supports petitioners' position.

The second case cited by petitioners, *Sayble* v. *Blue Cross of Southern California*, 208 Cal. App. 3d 1108 (1989), held that an ERISA plan had not been created where the employer did not participate in the administration of the insurance benefit. *Id.*, at 1117. Although that case appears, at least superficially, to support petitioners' position, it is not a decision of a "state court of last resort," so that its departure from *Kanne* does not present a conflict within the purview of Rule 17 of the Rules of this Court. To the contrary, the California Supreme Court's only decision in this area is *Commercial Life Insurance Co. v. Superior Court*, 47 Cal. 3d 473, 764 P.2d 1059 (1988), *cert. denied sub nom. Juliano* v. *Commercial Life Insurance Co.*, 57 U.S.L.W. 3753 (U.S. May 15, 1989). Although *Commercial Life* did not have occasion to address the applicability of the pertinent regulations, the opinion specifically endorsed and relied on the Ninth Circuit's decision in *Kanne*.

Apart from citing these cases, petitioners give no explanation why the Secretary of Labor's interpretation of ERISA's coverage is not entitled to deference in this case. As this Court observed just this Term in support of a particular interpretation of ERISA: "The Secretary, who is specifically authorized to define ERISA's 'accounting, technical, and trade terms,' and to whose reasonable views we give deference, has also so understood the statute." *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673-74 (1989) (footnote and citations omitted). Thus, the Secretary's view of ERISA's coverage is entitled to substantial weight, and the Ninth Circuit was entirely correct in following it in this case.

B. The Ninth Circuit Correctly Concluded That ERISA Preempts Petitioners' Section 790.03 Claim

The Ninth Circuit also decided that ERISA preempts the petitioners' Section 790.03 claim. Petitioners contend that this conclusion is inconsistent with this Court's decision in *Pilot Life* and with ERISA's savings clause. Neither contention is tenable.

The court of appeals in *Kanne*, and the California Supreme Court in *Commercial Life*, *supra*, found private causes of action under California's Section 790.03 to be preempted under the approach adopted by this Court in *Pilot Life*. In *Pilot Life*, the Court concluded that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." 481 U.S., at 52; *see id.*, at 54. Moreover,

this Court found a "clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive." *Id.*, at 57. In this case, the Ninth Circuit did "not find it possible to read [*Pilot Life*] in a way that permits a state statute like § 790.03(h) to supplement the ERISA civil enforcement provisions available to remedy improper claims processing," 867 F.2d, at 494, and thus found petitioners' Section 790.03 claim to be preempted. *Id.*

Petitioners claim that the court of appeals reading of *Pilot Life* conflicts with the language of the savings clause because Section 790.03 is a law "which regulates insurance." *See* Pet. at 28. However, the Ninth Circuit found that even if Section 790.03 was enacted to regulate insurance, the implied right of action formerly recognized in California was nonetheless preempted under this Court's interpretive approach in *Pilot Life*.[6] In *Pilot Life*, the Court divined ERISA's preemptive force by reference to the language, structure, and legislative history of its civil enforcement provisions. *See* 481 U.S., at 52. *Pilot Life* concluded that ERISA's civil enforcement provisions were intended to provide the exclusive remedies for ERISA-plan participants claiming improper processing of claims. Petitioners' position is that the savings clause should be read to preserve state law causes of action

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[6] As the court stated:

> We can assume, without deciding, that § 790.03(h) is a law regulating insurance under the savings clause. Nevertheless, under *Pilot Life* we find the conclusion inescapable that the private right of action for violation of § 790.03(h) is preempted by ERISA.

867 F.2d, at 493 (footnote omitted).

even though they intrude on the exclusive federal remedies established by ERISA. But *Pilot Life* establishes that the savings clause must be interpreted in light of ERISA's exclusive civil enforcement mechanisms, and that, as so interpreted, the savings clause does not save from preemption causes of action such as those that were (but no longer are) implied from Section 790.03.

An additional flaw in petitioners' argument is that it fails adequately to distinguish between a law regulating insurance and implied rights of action that provide supplemental means of enforcement. Neither *Pilot Life* nor the court of appeals' opinion in this case suggests that ERISA preempts Section 790.03 itself. Rather, these cases stand for the more limited proposition that certain means of enforcement—in this case, an implied private right of action by the ERISA-plan participant—are inconsistent with ERISA's exclusive civil enforcement mechanisms for private claims and therefore are preempted. Enforcement of Section 790.03 through administrative proceedings, unlike an implied private cause of action, would not appear to conflict with ERISA's exclusive civil enforcement remedies established for use by ERISA-plan participants. This is so because implied private causes of action like the one in this case are brought by the ERISA-plan participant whereas administrative and regulatory proceedings are conducted by the state insurance commissioner. Only the former means of enforcement were considered by the Ninth Circuit in this case.[7]

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[7] Indeed, in finding petitioners' Section 790.03 cause of action to be preempted, the court of appeals expressly noted: "We

CONCLUSION

The petition for writ of certiorari in this case presents one question that is of ephemeral interest in a limited number of California cases and that already has been resolved consistently by the Ninth Circuit and the California Supreme Court. The second question is of equally limited significance because it was resolved against petitioners by both courts below based upon the particular facts of this case, facts that petitioners failed to contest in a timely fashion. For these reasons, the Petition should be denied.

Respectfully submitted,

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express no opinion as to whether the *substantive* provisions of § 790.03(h) are themselves preempted so as to bar administrative enforcement by California's Insurance Commissioner." 867 F.2d, at 493 n.6 (emphasis added), Pet. app. at D-94.